

**Before the
Federal Communications Commission
Washington, DC**

In the Matter of)	
)	
Request for Review of the Decision of the)	CC Docket No. 02-6
Universal Service Administrator by)	
)	
Holy Name of Jesus School)	
Los Angeles, CA)	SLD File No. 473686
)	
Schools and Libraries Universal Service)	
Support Mechanism)	

REQUEST FOR REVIEW OR WAIVER

Holy Name of Jesus School (“HNJS” or “School”), by its representative, hereby requests that the Commission review and reverse the Notification of Improperly Disbursed Funds (“Notification Letter”) of the Universal Service Fund Administrator (“USAC”). USAC references the Notification Letter in its Demand Payment Letter, dated January 3, 2011, for \$16,869 in E-rate funds associated with FRN 134900.

HNJC never received USAC’s Notification Letter. It received the Demand Payment Letter, but not from USAC directly. The School did not see the Demand Payment Letter until its service provider sent it a courtesy copy. Accordingly, this is a Request for Review of USAC’s decision dated January 3, 2011, the first official notice of an adverse decision that the School received in connection with this FRN.

Request for Review. In its Demand Payment Letter, USAC asserts that the School’s technology plan did not receive approval before services began, and, therefore, USAC disbursed funding for the school’s internal connections project in error. HNJS, on the other hand, contends that it had a technology plan in place, that it covered the eligible services, and that it reasonably believed, at the time and under the circumstances, that it was in compliance with the rules governing technology plan approval. Accordingly,

HNJS requests that the Commission direct USAC to restore funding to FRN 1349400 and to rescind its Demand Payment Letter.

Request for Waiver. HNJS is one of the inner-city elementary schools in the Roman Catholic Archdiocese of Los Angeles. At the time it filed its FY2005 application, HNJS was serving a student population of 260 students, of which 91.3% were eligible for free or reduced price lunch. The Archdiocese of Los Angeles maintains nine levels of financial condition. Schools at “9” stand on the precipice of financial collapse. HNJS is currently teetering on the brink at “8.” We urge the Commission to take all of the circumstances into account. If it does, we strongly believe, it will be evident that it would not be in the public interest to force HNJS to return the funds it used to install badly needed network infrastructure in a small, struggling urban school that serves students from some of the city’s most impoverished homes. Therefore, in the alternative, HNJS requests that the Commission reach the same result by waiving its rules.

BACKGROUND

On June 18, 2009, USAC informed HNJS that it had failed to provide a technology plan approval letter during a site visit. (*See* Exhibit 1). This failure, it said without any further explanation, had led to a COMAD referral -- but to the best of our knowledge, HNJS has never received an official COMAD Letter. It should be noted that USAC’s June 18 notice was not an official commitment adjustment decision; it simply asked for additional information about the status of the school’s tech plan.

On July 22, 2009, the legal consultant to the Archdiocese, Rosa Cumare, responded on behalf of the School to USAC’s notice and request for documentation. (*See* Exhibit 2, 3, 4 and 5). She discussed in great detail the circumstances surrounding the School’s technology plan, explaining why HNJS reasonably believed that it had been covered by the Archdiocese’s overarching technology plan and, furthermore, why it reasonably believed that the Archdiocese’s plan had been approved. In closing, Ms. Cumare stated, “I hope that these facts address the concerns you raised in your June 18 letter and that the School will not have to reimburse USAC for the funds. As I indicated

at the outset, Holy Name of Jesus School is one of the very poor parochial schools in the Archdiocese of Los Angeles; the School simply does not have the wherewithal to pay such an unanticipated sum.”

For the remainder of 2009, no one associated with the School heard anything further about this matter from USAC. All of 2010 passed too with no word from USAC.

It was not until January 3, 2011, approximately one and a half years after USAC had first contacted HNJS for more information about its tech plan that the School finally heard something back about the matter from USAC. (*See Exhibit 4*). HNJS did not, however, hear back from USAC directly. As Ms. Cumare explained to the USAC representative (*See Exhibit 5*):

On January 3, 2011, this office received from California Micro Systems, the service provider for Holy Name of Jesus School, a Demand Payment Letter for funding year 2005-06. This was the first communication either this office or the school received on the subject since I submitted to you by email and fax on July 22, 2009, the school’s response (see attached) to your inquiry concerning its technology plan. Needless to say, the school is surprised by and disappointed in the determination that it must reimburse to USAC the entire amount of funding disbursed. Is there still a possibility of discussing this issue with you? We would like to know, for example, what other investigation was conducted aside from receiving my explanation almost one and a half years ago, and would like to know if either the amount due can be adjusted or whether a gradual payment plan is possible. Holy Name of Jesus School is, as I indicated in my July 2009 submission, one of the poor schools in the inner city which cannot readily make a payment of almost \$17,000.00.

In its Demand Payment Letter, USAC asserted that it had “recently sent a “Notification of Improperly Disbursed Funds Letter informing you of the need to recover funds from you...”. No one at HJNS or the Archdiocese, however, has ever seen such a letter, and no one at California Micro Systems has ever said anything to the School about receiving one either. USAC went on to find that HJNS was not entitled to any funding for its internal connections project because it had started the project before its technology plan had received formal approval.¹

¹ USAC sent a “Second Request” on February 3, 2011. (*See Exhibit 7*).

On January 14, USAC's representative responded to Ms. Camare. She said that she could not explain the long delay, thanked Ms. Camare for providing copies of the relevant technology plans, and advised her that the School's funding request was doomed because it had never been formally approved. (*See* Exhibit 6).

DISCUSSION

Request for Review

The Commission should reverse USAC's decision to rescind the School's E-rate support for two reasons. First, HNJS had a technology plan in place at the time it started work on its internal connections project. Unlike some schools and libraries that essentially "wing it," HNJS was doing its best to plan and implement its technology projects in an intelligent and thoughtful manner. While, concededly, the plan did not have a formal stamp of approval, the plan was nevertheless and for all intents and purposes, and especially for a school of this small size, a sound and reasonable one. Where this much money (relatively speaking) is at stake and where, as here, the harm involved in recovering it will far outweigh any administrative benefit that could possibly be derived from remedying a technical rule violation, substantial compliance with the rules should account for something.

Second, HNJS reasonably and in good faith believed that, for E-rate purposes, it could rely on the Archdiocesan Technology Plan for technology plan approval purposes. *See* Exhibit 2, Ms. Cumare's explanation to Ms. Peterson at USAC. *See, also*, Exhibit 10, the School's Form 470 in which the box for "covered by higher-level technology plans for using the services requested in the application" is checked. The fact of the matter is that the School could rely on the Archdiocesan Technology Plan for this purpose. Unfortunately, though, and this was something that the School was completely unaware of at the time, the Archdiocesan plan had not been re-approved.

The issue again, therefore, is whether recovery is warranted where an applicant reasonably believed that it had complied with the rules, but due to technical

circumstances beyond its control, that turns out not to be the case. We believe strongly that recovery in these circumstances is unwarranted, especially where there is no evidence of waste, fraud or abuse -- and there is no such evidence or allegation of that here.

Moreover, it is interesting to note that if the School had been able to point to an approved plan, it would have moved forward with exactly the same internal connections project – and it would have received funding for it. Thus a formal stamp of approval on a technology plan is all that separates the two scenarios. Under the circumstances, therefore, demanding that the School pay this money back seems to us far more punitive than remedial and certainly not in the best interests of the program.

Request for Waiver

The Commission may waive any provision of its rules for good cause shown.² A rule may be waived where the particular facts make strict compliance inconsistent with the public interest.³ In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.⁴ In sum, waiver is appropriate if special circumstances warrant a deviation from the general rule, and such deviation would better serve the public interest than strict adherence to the general rule.⁵

The case for waiver here is particularly strong. For the reasons discussed above and also below, it is clear that strict compliance in these circumstances with the Commission's rules would be inconsistent with the public interest. If the demand for recovery of \$16,869 is enforced, the School's financial resources will be strained to the breaking point. For a school of this size, which is already close to economic collapse, paying back this amount of money would be impossible. It simply does not have the

² 47 C.F.R. §1.3.

³ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

⁴ *WAIT Radio v. FCC*, 418 F.2d 1153, 1157, (D.C. Cir. 1969), *affirmed by WAIT Radio v. FCC*, 459 F.2d 1203 (D.C. Cir. 1972).

⁵ *NetworkIP, LLC v. FCC*, 548 F.3d 116, 125-128 (D.C. Cir. 2008); *Northeast Cellular*, 897 F.2d at 1166.

wherewithal to do so. This is a small school of approximately 260 students who come from extremely poor households. This is exactly the kind of school and students the E-rate program was designed to help. It should not be placed in the position of having to or possibly having to close because of a technical rule violation.

The School did not try to circumvent the rules. Indeed, it believed in good faith that it was following all of them. It had a good technology plan, and it followed it. It did not purchase an excessive amount of goods or services. There is no allegation of gold-plating, collusion or anything of the sort. The staff was doing everything it possibly could to educate itself and follow the rules. Except for the fact that the School's technology plan did not have an official stamp of approval, there is no allegation that it did anything wrong.

While we understand and appreciate why, as a general policy matter, it is very important that technology plans be approved, we also understand and appreciate that, on a micro level, that stamp of approval should not be used as a litmus test to decide whether or not it is appropriate for an applicant to keep its funding. As a policy matter, those kinds of cases should be decided on the merits of each. We believe strongly, and we hope the Commission will agree, that in this instance, the merits line up solidly in support of HNJS. Therefore, we respectfully request that the Commission waive its rules and direct USAC to restore to HNJS the E-rate funding tht it so desperately needs.

Respectfully submitted
on behalf of Holy Name of Jesus School
/s/ Cathy Cruzan

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